NO. 22527

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM DUKE ANDREWS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

On July 27, 1967, a six count indictment was returned against appellant by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2]. 1/

The indictment charged appellant with the violation of Federal laws relating to the possession of stolen mail and the forgery of United States Treasury Checks [C. T. 2].

Appellant was convicted on all six counts at a trial before the District Court on August 16, 1967 [C. T. 21, 38]. Trial by

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1/ "C. T." refers to clerk's transcript.

jury had previously been waived by the appellant [C T. 20].

On October 23, 1967, appellant was sentenced to the custody of the Attorney General for ten years on Counts One, Three and Five, and was sentenced to five years on Counts Two, Four and Six, with the sentence on all six counts to begin and run concurrently. The sentence on all counts was made subject to Title 18, United States Code, Section 4208 (a) (2). The appellant was further ordered to pay a fine of $500 as part of the sentence in Counts One, Three and Five [C. T. 38].

Appellant filed a timely Notice of Appeal on October 23, 1967 [C. T. 47].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Sections 495 and 1708. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Section 495 of Title 18, United States Code, provides in pertinent part as follows:

> "Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving or of enabling any other person, either directly or indirectly, to

obtain or receive from the United States or any officers or agents thereof, any sum of money . . ." shall be guilty of an offense.

Section 1708 of Title 18, United States Code, provides in pertinent part as follows:

> "Whoever steals, takes, or abstracts, or by defraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or . . .
>
> "Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted . . . " shall be guilty of an offense.

III

STATEMENT OF THE CASE

Appellant was indicted on July 27, 1967, by the Federal Grand Jury for the Southern District of California, Central Division. Counts One, Three and Five of the six-count indictment charged that the appellant unlawfully had in his possession, on July 16, 1965, August 10, 1965, and September 11, 1965, the contents of letters he knew had been stolen from the mail. Counts Two, Four and Six of the indictment charged the appellant with forging the endorsement of payees on three United States Treasury checks [C. T. 2].

The appellant waived a trial by jury and a court trial was held on August 16, 1967, before the Honorable Peirson M. Hall, at which time the appellant was found guilty of all six counts of the indictment [C. T. 21].

On September 18, 1967, the trial court, on its own motion, appointed a psychiatrist to conduct an examination as to the appellant's mental competency both at the time of the offense charged and at the time of trial [C. T. 22-23]. The psychiatrist prepared two reports, which were filed with the court on October 9, and October 23, 1967 [C. T. 26, 39].

On October 23, 1967, the appellant was sentenced as indicated in the Jurisdictional Statement.

Appellant filed a timely Notice of Appeal on October 25, 1967 [C. T. 47].

IV

STATEMENT OF FACTS

Norman Gary Whitley was called as a witness by the Government and testified that he was employed as a mail carrier until January, 1966, when he was discharged for stealing mail [R. T. 17]. 2/

Starting in May, 1965, he gave to the appellant United States mail containing United States Treasury checks addressed to payees J & O Kesee, Hans J. Christensen and others, in exchange for cash from the appellant [R. T. 20, 25, 34].

The Government called as witnesses, payees of two of the Treasury checks, Odessa Kesee and Brenda L. Scott. Each testified that she did not know the appellant, did not receive the Treasury check addressed and made payble to her, did not authorize the appellant to sign her endorsement to the check, and did not authorize the appellant to cash the check [R. T. 46-48 and 80-82].

Victor DiLoreto, Jr., a postal inspector, was called as a Government witness and testified that on May 3, 1967, he interviewed the appellant and at that time the appellant was shown the United States Treasury checks marked as Government's Exhibits 1, 2 and 3, and denied signing the endorsements of the payees, but admitted signing his own signature as the second

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2/ "R. T." refers to Reporter's Transcript.

endorsement on each check and that the checks went through his bank account [R. T. 60-63].

Exemplars of the appellant's known handwriting were admitted into evidence by stipulation [R. T. 64].

Simeon Wilson, a qualified Government handwriting expert, was called as a Government witness and testified that he had conducted an examination of the handwriting on the back of the checks admitted in evidence and made a comparison of this handwriting with appellant's known handwriting. Mr. Wilson testified that the endorsements of the payees and the second endorsements in the name of William Andrews were written by the appellant [R. T. 78].

The appellant, William Duke Andrews, testified in his own behalf that during 1965 he ran a check cashing service and cashed approximately $4000 worth of checks. He denied that he signed the endorsement of the payees on the Treasury checks admitted into evidence [R. T. 90-91, 94-95]. Appellant claimed he could not remember if he deposited Government Exhibit 2 in his savings account or if he prepared the deposit slip [R. T. 97-98]. He alleged that Mr. Whitley had authority to withdraw money from his savings account, but this was denied by Mr. Whitley [R. T. 98, 125-126].

After cross-examination of the appellant was completed, the trial Court questioned him in part as follows:

> "THE COURT: By the way, you say you are collecting total disability?

"THE WITNESS: Yes, sir.

"THE COURT: What is your disability?

"THE WITNESS: Total disability.

"THE COURT: What is the matter with you?

"THE WITNESS: I can't think of the term they used.

"THE COURT: Does your back hurt?

"THE WITNESS: No, it is my head. I got shell-shocked when I was in the service.

"THE COURT: Is there something wrong with your head? Are you all right now?

"THE WITNESS: I think I am, sir.

"THE COURT: I mean, is there some question about your competency to understand this trial and know what is going on?

"THE WITNESS: I wouldn't think so, sir. [R. T. 116]

* * *

"THE COURT: So what are you doing now?

"THE WITNESS: Right now I am doing yard and lawn work.

"THE COURT: You mean piece work?

"THE WITNESS: Piece work.

"THE COURT: You have regular customers?

"THE WITNESS: I have regular customers.

"THE COURT: How many can you take care of

in a month?

"THE WITNESS: I can take care of a lot more than I do, but the regular customers are about, I would say, nine or ten a month.

* * *

"THE COURT: Did you tell your counsel that you were disabled because of an injury to your head?

"THE WITNESS: Yes, sir.

"THE COURT: And that you were shell-shocked?

"THE WITNESS: It isn't shell shock, I am trying to get the word, they call it dementia praecox.

"THE COURT: Dementia praecox?

"THE WITNESS: Yes, sir.

"THE COURT: Were you aware of this counsel?

"MR. MIRECKI: No, I was not aware of it. He told me he was getting a Government check but never told me what for, your honor.

"THE COURT: I see.

"You are satisfied that you are mentally competent and you understand these proceedings?

"THE WITNESS: Yes, sir, I think I do.

"THE COURT: And you have been able to assist your counsel in your defense?

"THE WITNESS: Yes, sir.

"THE COURT: Has he given any indication of his inability to understand the proceedings, counsel,

or to assist you in any way?

"MR. MIRECKI: No.

"May I ask him if he will waive the attorney and client privilege for a minute, your Honor?

"THE COURT: Yes.

"MR. MIERCKI: May I speak to the court about what we spoke of up in Mr. Shekoyan's office?

"THE COURT: Yes?

"MR. MIRECKI: I told the defendant that I didn't think that we should go to trial, in fact when I left the court here yesterday I spoke to Mr. Andrews and explained to him about Mr. Black and everything else, and the defendant insisted on going to trial. I stayed up last night trying to prepare for this case based on what he wanted. Now I realize the handicap I have been under, and I have been appointed, your Honor.

"THE COURT: I understand that.

"MR. MIRECKI: And he never told me about his disability.

"THE COURT: My only point is whether or not at the present time there is some question concerning his mental competence, because if there is why I should have him examined by a psychiatrist. My only question to you is not what you have advised him to do, which I will disavow, but whether or not he has

given any indication to you that he couldn't understand the proceedings and he has been able to tell you what he wanted about this case.

"MR. MIRECKI: No. He has been in fact trying to call too many shots here." [R. T. 118-120].

On September 18, 1967, the date originally set for sentencing the appellant, the trial court ordered that the appellant be examined as to mental competency by a court-appointed psychiatrist [C. T. 22-23]. The initial report of the psychiatrist found: "The defendant is presently sane. He is able to understand the proceedings against him and is capable of assisting counsel in his own defense. He was legally sane at the time of the alleged acts' alleged commission, and was legally sane at the time of present examination." [C. T. 35]. Subsequently, the appellant's Veterans Administration Medical file, dating back to 1944, was reviewed by the court-appointed psychiatrist and he filed a supplemental report with the trial court stating:

"After reading these records, the examiner is unconvinced that this defendant has ever suffered any form of mental illness which resulted either from his boxing or from his military service in which he had no combat duty. The defendant is, in my opinion, a clever manipulator. My diagnosis continues as in the first report." [C. T. 44].

On October 23, 1967, the two reports of the psychiatrist were admitted into evidence and the appellant was allowed to read a letter he had written for the court's attention [R. T. 133-136]. The court also indicated that it had read and considered prior letters addressed to the court by the appellant [R. T. 133]. The court further indicated that it had read the probation report and was considering it as well as the observation of the appellant during the trial and while he was on the witness stand [R. T. 137].

The appellant presented no other evidence at the time of the hearing. The appellant did not seek to raise mental incompetency as a defense at the time of trial, but rather denied same.

V

ISSUE PRESENTED

Was the trial court's determination of competency arbitrary and unwarranted?

VI

ARGUMENT

The only contention of appellant on appeal is that the trial court simply adopted the determination of the psychiatrist who examined the appellant as its conclusion that the appellant was mentally competent to understand the proceedings against him and to assist his counsel in his defense.

This contention is clearly untenable as the facts of the case indicate. During the trial the appellant did not offer any evidence relating to his mental competency. Only after the appellant had finished his testimony did the court, on its own, question the appellant concerning his mental competency. Even then, both the defendant and his counsel affirmed that the appellant understood the proceedings, was able to assist his counsel, and was mentally competent. (The colloquy between the court and the appellant and his counsel is set forth in the Statement of Facts, hereinabove.)

Furthermore, on October 23, 1967, when a hearing on the psychiatric examination was held, and before the appellant was sentenced, the trial court stated that it was considering the psychiatric report, the probation report, the letters that the appellant had written to the court, the appearance and statements of the appellant on the witness stand during the trial, and the letter read to the court by the appellant, in concluding that the appellant was mentally competent and understood the proceedings at the time of trial [R. T. 137].

The appellant's contention that the court simply adopted the psychiatrist's findings is apparently based on the fact that the court reiterated the psychiatrist's conclusion that the appellant was a clever manipulator [R. T. 137, C. T. 44]. The appellant offered no evidence other than his statement to the court on October 23, 1967, concerning his mental competency. The record is clear that the court reviewed and considered all the evidence before it in reaching the conclusion that the appellant was mentally

competent.

Under Section 4244 of Title 18, United States Code, the duty and responsibility of determining whether a defendant who has a mental illness or defect is or is not competent to stand trial is that of the trial court and his determination in that regard can not be set aside on review unless clearly arbitrary or unwarranged.

Dusky v. United States, 271 F. 2d 385, 397 (8th Cir. 1959), reversed on other grounds, 362 U. S. 402.

The facts are clear that the trial court's determination was neither arbitrary nor unwarranted. Mental competency was never raised as an issue in the proceedings.

In proceedings under Title 18, United States Code, Section 4244, if the psychiatrist's report finds the defendant competent, the matter may end there, for, so far as the statute is concerned, the trial court is not required to hold a hearing to determine the defendant's present competency even though the defendant may wish to contest the report's conclusion.

Stone v. United States, 358 F. 2d 503, 506 (9th Cir. 1966);

Meador v. United States, 332 F. 2d 935, 936 (9th Cir. 1964);

Formhals v. United States, 278 F. 2d 43, 48 (9th Cir. 1960).

The appellant was found competent by the psychiatrist [C. T. 35, 44].

VII

CONCLUSION

For the reasons stated herein, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James E. Shekoyan
JAMES E. SHEKOYAN